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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 PAUL ZARAGOZA AKA G. GARCIA,  
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Petitioner,

vs.

MATTHEW CATE,  
Respondent.

CASE NO. 09cv1598 DMS (WMC)

**ORDER (1) ADOPTING IN PART  
AND REJECTING IN PART  
MAGISTRATE JUDGE'S  
REPORT AND  
RECOMMENDATION, (2)  
PROVIDING OPTIONS, AND (3)  
DENYING RESPONDENT'S  
MOTION TO DISMISS WITHOUT  
PREJUDICE**

**[Docket Nos. 8, 12]**

On July 22, 2009, Petitioner Paul Zaragoza ("Petitioner"), a state prisoner proceeding *pro se*, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On November 9, 2009, Respondent filed a motion to dismiss the petition on the grounds that some of Petitioner's claims were unexhausted. On July 6, 2010, Magistrate Judge William McCurine, Jr. issued a Report and Recommendation, recommending that the Court (1) find the petition is "mixed," *i.e.*, it contains exhausted and unexhausted claims, (2) provide Petitioner with a list of options on how to proceed, and (3) grant the motion to dismiss. This Court, having reviewed *de novo* the Magistrate Judge's Report, and there being no objections filed thereto, adopts in part and denies in part the recommendation.

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1 In light of the Court's finding that the petition is mixed, Petitioner may choose one of the  
2 following options.

3 **1) Demonstrate Exhaustion**

4 Petitioner may file further papers with this Court to demonstrate that he has in fact exhausted  
5 claims I.A., I.B., II and III.A.

6 **2) Voluntarily Dismiss the Petition**

7 Petitioner may move to voluntarily dismiss his entire federal petition and return to state court  
8 to exhaust his unexhausted claims. Petitioner may then file a new federal petition containing only  
9 exhausted claims. *See Rose v. Lundy*, 455 U.S. 509, 510, 520-21 (stating that a petitioner who files a  
10 mixed petition may dismiss his petition to "return[] to state court to exhaust his claims").

11 Petitioner is cautioned that any new federal petition must be filed before expiration of the one-  
12 year statute of limitations. Ordinarily, a petitioner has one year from when his conviction became final  
13 to file his federal petition, unless he can show that statutory or equitable tolling applies. *Duncan v.*  
14 *Walker*, 533 U.S. 167, 176 (2001); 28 U.S.C. § 2244(d).<sup>1</sup> The statute of limitations does not run while  
15 a properly filed *state* habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*,  
16 183 F.3d 1003, 1006 (9th Cir. 1999). *But see Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (holding that "an  
17 application is 'properly filed' when its delivery and acceptance [by the appropriate court officer for  
18 placement into the record] are in compliance with the applicable laws and rules governing filings.");  
19 *Bonner v. Carey*, 425 F.3d 1145, 1149 (9th Cir. 2005) (holding that a state application for post-

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21 <sup>1</sup> 28 U.S.C. § 2244 (d) provides:

22 (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by  
a person in custody pursuant to the judgment of a State court. The limitation period shall run from the  
latest of—

23 (A) the date on which the judgment became final by the conclusion of direct review  
or the expiration of the time for seeking such review;

24 (B) the date on which the impediment to filing an application created by State action  
in violation of the Constitution or laws of the United States is removed, if the applicant  
was prevented from filing by such State action;

25 (C) the date on which the constitutional right asserted was initially recognized by the  
Supreme Court, if the right has been newly recognized by the Supreme Court and made  
retroactively applicable to cases on collateral review; or

26 (D) the date on which the factual predicate of the claim or claims presented could have  
27 been discovered through the exercise of due diligence.

28 (2) The time during which a properly filed application for State post-conviction or other  
collateral review with respect to the pertinent judgement or claim is pending shall not be counted  
toward any period of limitation under this subsection.

conviction relief which is ultimately dismissed as untimely was neither “properly filed” nor “pending” while it was under consideration by the state court, and therefore does not toll the statute of limitations), *as amended* 439 F.3d 993. However, absent some other basis for tolling, the statute of limitations continues to run while a federal habeas petition is pending. *Duncan*, 533 U.S. at 181-82.

### 3) Formally Abandon Unexhausted Claims

Petitioner may formally abandon his unexhausted claims and proceed with his exhausted claim. *See Rose*, 455 U.S. at 510, 520-21 (stating that a petitioner who files a mixed petition may “resubmit[] the habeas petition to present only exhausted claims”).

Petitioner is cautioned that once he abandons his unexhausted claims, he may lose the ability to ever raise those claims in federal court. *See Slack v. McDaniel*, 529 U.S. 473, 488 (2000) (stating that a court’s ruling on the merits of claims presented in a first § 2254 petition renders any later petition successive); *see also* 28 U.S.C. § 2244 (a)-(b).<sup>2</sup>

### 4) File a Motion to Stay the Federal Proceedings

Petitioner may file a motion to stay this federal proceeding while he returns to state court to exhaust his unexhausted claims. There are two methods available to Petitioner, the “stay and abeyance” procedure and the “withdrawal and abeyance” procedure.

If Petitioner wishes to use the “stay and abeyance” procedure he should ask the Court to stay his mixed petition while he returns to state court to exhaust. Under this procedure he must demonstrate there are arguably meritorious claim(s) which he wishes to return to state court to exhaust, that he is diligently pursuing his state court remedies with respect to those claim(s), and that good cause exists for his failure to timely exhaust his state court remedies. *Rhines v. Webber*, 544 U.S. 269, 277-78 (2005).

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<sup>2</sup>28 U.S.C. § 2244(b)(2) provides that a claim presented in a second or successive habeas corpus application under § 2254 shall be dismissed unless:

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or  
 (B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and  
 (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

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2 If Petitioner wishes to use the “withdrawal and abeyance” procedure, he must voluntarily  
 3 withdraw his unexhausted claim, ask the Court to stay the proceedings and hold the fully-exhausted  
 4 petition in abeyance while he returns to state court to exhaust, and then seek permission to amend his  
 5 petition to include the newly exhausted claim(s) after exhaustion is complete. *King v. Ryan*, 564 F.3d  
 6 1133 (9th Cir.), *cert. denied*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 214 (2009). Although under this procedure  
 7 Petitioner is not required to demonstrate good cause for his failure to timely exhaust, the newly  
 8 exhausted claim(s) must either be timely under the statute of limitations or “relate back” to the claims  
 9 in the fully-exhausted petition, that is, they must share a “common core of operative facts” with the  
 10 previously exhausted claims. *King*, 564 F.3d at 1143 (quoting *Mayle v. Felix*, 545 U.S. 644, 659 (2005)).

11 Petitioner shall inform the Court of his decision on or before **September 27, 2010**. Upon receipt  
 12 of Petitioner’s response, the Court will invite Respondent to file an appropriate response. If Petitioner  
 13 fails to respond to this Order, the Petition will be dismissed without prejudice.<sup>3</sup> *See Rose*, 455 U.S. at  
 14 522.

15 In light of these options, Respondent’s motion to dismiss is denied without prejudice.

16 **IT IS SO ORDERED.**

17 DATED: August 26, 2010

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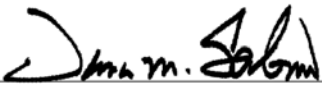
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 HON. DANA M. SABRAW  
 United States District Judge

<sup>3</sup>Although the dismissal is “without prejudice,” Petitioner is again cautioned that any later federal petition may be barred by the statute of limitations. *See* 28 U.S.C. § 2244(d)(1)-(2); *see also* footnote two of this Order.